IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re:	:	
	:	Case No. 10-16427
Kevin Richard Goheen	:	Chapter 13
	:	Bankruptcy Judge Beth A. Buchanan
	:	
Margaret A. Burks, Trustee	:	Chief Judge Susan J. Dlott
	:	
Plaintiff/Appellee,	:	Adversary Case No. 11-1015
	:	Case (Appeal) No. 1:12-cv-270
v.	:	
	:	ORDER AFFIRMING THE ORDER
Deutsche Bank Trust Company,	:	FROM THE UNITED STATES
	:	BANKRUPTCY COURT
Defendant/Appellant.	:	SOUTHERN DISTRICT OF OHIO
	:	

This matter is before the Court on Defendant/Appellant's appeal of the Order: (A) Granting Trustee's Motion for Summary Judgment; and (B) Denying Deutsche Bank's Cross-Motion for Summary Judgment ("Bankruptcy Order") (Doc. 1-12). Judge Beth A. Buchanan, United States Bankruptcy Court Southern District of Ohio, held in the Bankruptcy Order that Plaintiff/Appellee Margaret A. Burks, the Trustee, could avoid a mortgage held by Defendant/Appellant Deutsche Bank Trust Company ("Deutsche Bank") which had been registered upon the certificate of title for a debtor's real property. For the reasons that follow, the Court will **AFFIRM** the Bankruptcy Order.

I. BACKGROUND

A. Factual

The material facts are not disputed. (Doc. 1-12 at 3; Doc. 3 at 7–9; Doc. 4 at 4.) On April 21, 2006, Countrywide Home Loans, Inc. loaned Kevin Goheen $90,400.00 secured by the property at 8334 Mayfair Street, Cincinnati, Ohio 45216 ("the Property"). Goheen signed a Mortgage (Doc. 1-8 at 5) to Countrywide which was subsequently filed and recorded in Hamilton County, Ohio. The Property is registered land and the Mortgage was filed for recording in the registered lands records accordingly. However, the copy of the Mortgage that was recorded by the Hamilton County, Ohio Recorder is missing several pages, including the notary acknowledgment clause, the fixed/adjustable rate rider, and the legal description of the property. The recorded Mortgage, therefore, does not include a notary acknowledgment required by Ohio Revised Code ("O.R.C."). "A . . . mortgage . . . shall be signed by the . . . mortgagor" and "[t]he signing shall be acknowledged by the . . . mortgagor . . . before a . . . notary public . . . who shall certify the acknowledgement and subscribe the official's name to the certificate of the acknowledgement." O.R.C. § 5301.01(A). Nonetheless, information regarding the Mortgage is noted on the registered land certificate of title for the Property (the "Certificate of Title").

The omission of the notary acknowledgment clause from the recorded Mortgage is the most relevant fact in this appeal. Deutsche Bank filed an Affidavit of Michael C. Fletcher with the Bankruptcy Court in which Fletcher averred that the copy of the Mortgage which he delivered to the Hamilton County, Ohio Recorder was complete and included the notary acknowledgment clause. (Doc. 1-9 at 14, 30.) There is no evidence in the record explaining how or why the filed copy of the Mortgage is incomplete.

B. Procedural

Goheen filed a Chapter 13 bankruptcy petition on September 20, 2010. (Doc. 1-12 at 3.) On February 1, 2011, the Trustee filed an adversary proceeding to avoid the Mortgage, which had been assigned from Countrywide to Deutsche Bank. Both the Trustee and Deutsche Bank moved for summary judgment in the adversary proceeding. On March 1, 2012, the Bankruptcy Judge issued the Bankruptcy Order granting summary judgment to the Trustee and denying it to Deutsche Bank. The Bankruptcy Judge held that the "the notation of the Mortgage on the Certificate of Title [was] ineffective and [did] not serve to perfect a lien against the Property or serve as notice of such lien[,]" and therefore, that the Trustee was "entitled to avoid the Mortgage pursuant to Section 544(a) of the Bankruptcy Code." (Doc. 1-12 at 20.)

Deutsche Bank appealed the Bankruptcy Order to this Court on April 4, 2012. The parties have submitted their appellate briefs and the issue on appeal is ripe for adjudication.

II. STANDARD OF REVIEW FOR BANKRUPTCY ORDER

Generally, this Court reviews a bankruptcy court's findings of fact for clear error and reviews conclusions of law *de novo*. *Davis v. Green Tree Serv., LLC* (*In re Davis*), 386 B.R. 182, 184 (B.A.P. 6th Cir. 2008) (on conclusions of law); *United Steelworkers of Am. v. Ormet Corp.* (*In re Ormet Corp.*), 355 B.R. 37, 42 (S.D. Ohio 2006) (on findings of fact and conclusions of law). "[A]n appeal of the bankruptcy court's grant of summary judgment[ ] does not involve 'findings of fact' that are reviewed under a clearly erroneous standard." *Lyon v. So. Gas Co., Inc.* (*In re Wright Enterprises*), 77 F. App'x 356, 363 (6th Cir. 2003). Rather, the appeal of a bankruptcy court's summary judgment decision is *de novo*. *Id.*; *see also Cornwell Quality Tools Co. v. Paavo* (*In re Paavo*), No. 11-cv-10831, 2011 WL 6780720, at *5 (E.D. Mich. Dec. 27, 2011) (same).

III. STANDARD OF REVIEW FOR SUMMARY JUDGMENTS

Federal Rule of Civil Procedure 56 governs motions for summary judgment. Summary judgment is appropriate if "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On a motion for summary judgment, the movant has the burden of showing that no genuine issues of material fact are in dispute, and the evidence, together with all inferences that can permissibly be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 811 (6th Cir. 2011).

The movant may support a motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). In responding to a summary judgment motion, the nonmoving party may not rest upon the pleadings but must go beyond the pleadings and "present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). The Court's task is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249. A genuine issue for trial exists when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3).

"[W]here the parties have filed cross-motions for summary judgment, the court must consider each motion separately on its merits, since each party, as a movant for summary judgment, bears the burden to establish both the nonexistence of genuine issues of material fact and that party's entitlement to judgment as a matter of law." *Menninger v. Accredited Home Lenders* (*In re Morgeson*), 371 B.R. 798, 800–01 (B.A.P. 6th Cir. 2007).

IV. ANALYSIS

Deutsche Bank presents three assignments of error as follows:

> 1. Did the Bankruptcy Court err in granting the Summary Judgment Motion of Plaintiff?
>
> 2. Did the Bankruptcy Court err in holding that the fact that Defendant's mortgage was properly filed and noted on the Registered Land Certificate did not necessarily establish Defendant's lien was a valid, existing, and enforceable lien?
>
> 3. Did the Bankruptcy Court err in holding that there were no material issues of fact as to whether the mortgage as filed was a valid, existing, and enforceable lien?

(Doc. 3 at 10.) The assignments of error present overlapping issues and can be addressed together. Deutsche Bank contends that the Bankruptcy Judge erred in setting aside the Mortgage because the only evidence in the record indicates that Michael Fletcher delivered a complete copy of the Mortgage—a copy including the notary acknowledgment—to the Recorder's Office and the Mortgage was noted on the Certificate of Title. It claims that this fact is dispositive to establish that the Mortgage is valid pursuant to the registered land system in Ohio.

The Court will begin its analysis by reviewing the difference between Ohio's land registration system and the nonregistered land recording system. For nonregistered land, interests in real property are governed under the traditional recording system found at O.R.C. chapter 5301. Section 5301.23 provides that "[a]ll properly executed mortgages shall be recorded in the office of the county recorder of the county in which the mortgaged premises are situated and shall take effect at the time they are delivered to the recorder for record." O.R.C. § 5301.23(A). Section 5301.25 states that "[a]ll deeds, land contracts . . ., and instruments of writing properly executed for the conveyance or encumbrance of lands, . . . shall be recorded in the office of the county recorder" and that "[u]ntil so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument." O.R.C. § 5301.25(A). Under these nonregistered land provisions, "a properly executed mortgage must be filed with the appropriate county recorder's office in order to create a perfected interest in the property." *Bavely v. Huntington Nat'l Bank* (*In re Cowan*), 273 B.R. 98, 102 (B.A.P. 6th Cir. 2002).

The registered land system, also known as the Torrens system, is set forth in O.R.C. chapters 5309 and 5310. The registered land system relies on the filing and registration of mortgage interests on the certificate of title. "Under the Torrens system, the owners of registered land are issued a certificate of title, which contains a description of the registered parcel, along with memorials noting all liens, encumbrances and charges that bind the land." *In re Morgeson*, 371 B.R. at 802.

A mortgage is perfected under the registered land system by registering it on the certificate of title. Section 5309.47 provides in relevant part that "[w]henever any registered land . . . is intended to be charged or made security in favor of any mortgagee, the mortgagor shall execute a mortgage deed . . . [containing] a pertinent description of the land and an accurate statement of the interest intended to be mortgaged, charged, or encumbered, [which] *when registered* shall operate as a lien or charge upon and bind the land." O.R.C. § 5309.47 (emphasis added). "An owner of registered land, therefore, holds that land free of any mortgage which is not noted on the certificate of title." *In re Cowan*, 273 B.R. at 103; *see also* O.R.C. § 5309.28 (stating that every person who holds a certificate of title for registered land "shall hold the registered land free from all estates, encumbrances, and rights except those noted on the certificate"); *In re Morgeson*, 371 B.R. at 802 ("The certificate of title to registered land purports to show the exact state of title, and any liens or encumbrances not noted on the certificate of title are deemed unenforceable as to a bona fide purchaser.").

To have the mortgage registered upon the certificate of title, the mortgagor "files" the mortgage in the county recorder's office so that the recorder can enter the registration upon the certificate of title. O.R.C. § 5309.48. Upon the filing of the mortgage, the recorder must verify that the person creating the lien has a right to create the lien before entering the mortgage interest on the certificate of title. *Id.*[1]

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[1] The statute provides as follows:

> When a mortgage, encumbrance, or other instrument intended to create a lien upon or charge against registered land, as provided in section 5309.47 of the Revised Code, is filed in the county recorder's office, and the owner's duplicate certificate of title is produced, and it appears to the recorder that the person intending to create the lien or charge set forth in such instrument, has such right, and that the person in whose favor the same is sought to be created is entitled under sections 5309.02 to 5310.21, inclusive, of the Revised Code, to have such instrument entered as a memorial upon the register, the recorder shall enter upon the proper folium of the register, where such title is registered, and upon the owner's duplicate certificate of title, a memorial accurately stating the purport and nature of the lien or charge created, the date of filing the instrument, and its file number. The recorder shall note upon the instrument filed with him the volume and folium of the register in which the memorial is entered. The recorder shall at any time after registration of a mortgage, upon the request of the mortgagee and the tender of the proper fee therefor, make and deliver to the mortgagee a duplicate of the owner's registered certificate of title but having indorsed, stamped, or printed thereon in large letters "Mortgagee's Duplicate Certificate" instead of "Owner's Duplicate Certificate." The recorder shall note on the registered certificate of title the fact and date of making and delivering such duplicate and to whom delivered. In case of the loss or destruction of such mortgagee's duplicate certificate, another may be issued to him as provided in section 5309.31 of the Revised Code in reference to the loss or destruction of an owner's duplicate certificate.

O.R.C. § 5309.48.

Deutsche Bank argues that its Mortgage is a valid encumbrance upon the property as to the Trustee because the complete Mortgage was filed with, *i.e.* delivered to, the Hamilton County, Ohio Recorder's Office as required by O.R.C. § 5309.48 and was entered upon the Certificate of Title. Deutsche Bank contends that it is not relevant that the complete Mortgage, including the notary acknowledgment, was not properly recorded because recordation was not necessary under the land registration system.

The Bankruptcy Judge found against Deutsche Bank. (Doc. 1-12 at 16–17.) She noted that the registered land system was intended to supplement the traditional system. "Registered land, and ownership therein, except as otherwise provided in sections 5309.02 to 5310.21, inclusive, of the Revised Code, shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land." O.R.C. § 5309.85. She held that the mortgage execution requirements stated in O.R.C. § 5301.01 apply to registered lands despite the fact that they are not expressly contained in O.R.C. chapter 5309. (Doc. 1-12 at 17.)

At least one other federal court interpreting Ohio law has held explicitly that the mortgage execution requirements stated in O.R.C. § 5301.01 apply to registered lands. *See Price v. ABN AMRO Mortg. Group* (*In re Price*), 365 B.R. 794, 795 (Bankr. S.D. Ohio 2007) ("[A] mortgage on registered land must also comply with the acknowledgment requirements set forth in § 5301.01.") In *In re Price*, a mortgage holder sought summary judgment against the bankruptcy trustee who had filed an adversary proceeding to avoid the mortgage. At issue was whether the mortgage noted on the certificate of title for the registered land was invalid because a notary public was not present at the closing. *Id.* at 795. The *Price* court found that "a notation on the certificate [of title] does not correct any defects in the mortgage itself." *Id.* The court denied the mortgage holder's motion for summary judgment and refused to hold as a matter of law that the trustee could not avoid the mortgage as a bona fide purchaser because the mortgage was noted on the certificate of title. *Id.* at 795–96. The court then set the case for trial where the trustee could challenge the validity of the underlying mortgage. *Id.*

Similarly, in *In re Morgeson*, the Sixth Circuit Bankruptcy Appellate Panel rejected the mortgagee's argument that a "certificate of title must be given effect over the underlying mortgage document." 371 B.R. at 802. Rather, the Bankruptcy Appellate Panel concluded that "land registration was not designed to aid a mortgage company in expanding contractual rights against . . . bankruptcy trustees who stand as bona fide purchasers" and that it was not aware of any case "permit[ting] contractual rights to be expanded when the certificate of title reflects a greater right than provided under the mortgage document." *Id.* at 803.

The underlying recorded Mortgage in this case is invalid because it lacks the notary clause certifying the mortgagor's acknowledgment of his signature in violation of O.R.C. § 5301.01. The Bankruptcy Judge determined that the purported question of fact regarding how or why the acknowledgment page was omitted from the filed copy of the Mortgage was not material. (Doc. 1-12 at 2, 17–19.) The Bankruptcy Judge cited *Mortgage Electronic Registration System v. Odita*, 159 Ohio App. 3d 1, 9, 822 N.E.2d 821 (2004), for the proposition that "with property rights it is not necessary that the outcome be the best outcome possible in each case; only that the outcome be consistent across every case so as to provide reliability and predictability." (Doc. 1-12 at 18.) The most reliable and predictable means of determining the validity of a mortgage is to examine the copy of the mortgage on file with the county recorder. In fact, O.R.C. § 5309.48 provides that the county recorder is to look to the filed instrument to determine whether the mortgage creates a lien on the registered land and whether it therefore should be noted on the certificate of title. *See* O.R.C. § 5309.48 ("When a mortgage . . . is filed in the county recorder's office . . . and it appears to the recorder that the person intending to create the lien . . . has such right . . . the recorder shall enter . . . a memorial accurately stating the purport and nature of the lien or charge created."). The filed Mortgage here is executed improperly executed because it lacks the notary acknowledgment. The Bankruptcy Judge concluded, and this Court likewise concludes, that the county recorder lacked authority to note the Mortgage on the Certificate of Title.[2] (Doc. 1-12 at 20.) The Trustee was entitled to avoid the mortgage as a bona fide purchaser pursuant to 11 U.S.C. § 544(a)(3).

V. CONCLUSION

For the foregoing reasons, the Order: (A) Granting Trustee's Motion for Summary Judgment; and (B) Denying Deutsche Bank's Cross-Motion for Summary Judgment (Doc. 1-12) issued by Judge Beth A. Buchanan, United States Bankruptcy Court Southern District of Ohio, hereby is **AFFIRMED**.

IT IS SO ORDERED.

____s/Susan J. Dlott__________
Chief Judge Susan J. Dlott
United States District Court

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[2] On the other hand, if a mortgage on registered land is properly executed and properly recorded by the county recorder, but is not noted on the certificate of title, the mortgagee nonetheless does not have a perfected security interest on the property arising from the mortgage. *See In re Cowan*, 273 B.R. at 104.